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U.S. DEPARTMENT OF COMMERCE

ON THE
MARINE MAMMAL PROTECTION ACT OF 1972

BEFORE THE
COMMITTEE ON RESOURCES
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS
U.S. HOUSE OF REPRESENTATIVES

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Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify before the Subcommittee today on the Marine Mammal Protection Act. I am Penelope Dalton, Assistant Administrator for Fisheries.

NMFS, along with the U.S. Fish and Wildlife Service (FWS), administers the Marine Mammal Protection Act of 1972 (MMPA), which is the principal Federal legislation that guides marine mammal protection and conservation policy in U.S. waters. Under the provisions of the MMPA, NMFS is responsible for the management and conservation of over 140 stocks of whales, dolphins and porpoises, as well as seals, sea lions and fur seals. The remaining marine mammal species, such as polar bears, walruses, sea otters and manatees, are under the jurisdiction of the FWS.

I welcome the opportunity to discuss with you the merits of the MMPA as well as the positive impacts this legislation has had on marine mammal conservation and management. I will also describe NMFS' implementation of the MMPA Amendments of 1994. Finally, I will discuss those areas of the MMPA that could be addressed to improve the Agency's ability to fulfill its responsibilities.

Background of the MMPA

The MMPA was enacted in 1972 largely due to public response to the high levels of dolphin mortality in the Eastern Tropical Pacific tuna purse seine fishery, polar bear hunting in Alaska, the harvest of harp seals in Canada, and continuation of

commercial whaling. While there have been numerous changes to the Act, the MMPA Amendments of 1994 were by far the most comprehensive and included the addition of sections 117 and 118 to reduce marine mammal interactions with commercial fisheries and section 120 to implement expanded authority for lethal removal in certain situations. These amendments also modified section 104 regarding NMFS oversight of captive marine mammals, and section 101(a) on the taking and deterrence of marine mammals, and added a new section 119.

While the threats to marine mammals have changed over the years, one of the primary objectives of the MMPA has always been to minimize interactions between marine mammals and commercial fisheries. Prior to the MMPA Amendments of 1994, the MMPA granted fishermen an interim exemption for taking marine mammals if their vessels were registered under the Marine Mammal Exemption Program and they recorded marine mammal interactions in logbooks. This mechanism, along with observer programs, allowed NMFS to collect information on fishery-specific levels of marine mammal incidental take. These data were ultimately used to develop a comprehensive fisheries management regime that was introduced during the 1994 reauthorization of the MMPA. This new regime replaced the Marine Mammal Exemption Program with a long-term plan for governing interactions between marine mammals and commercial fisheries under new sections 117 and 118.

Implementation of MMPA Amendments of 1994

The MMPA Amendments of 1994 required that NMFS establish a long-term regime for protecting marine mammals in U.S. waters that included provisions directed toward the entire spectrum of marine mammal programs that NMFS conducts. These requirements included determining the status of over 140 stocks of marine mammals, establishing new requirements for categorizing commercial fisheries, registering and reporting of vessels relative to the level of serious injury and mortality of marine mammals, monitoring of incidental take through observer programs, and developing take reduction plans. The MMPA Amendments of 1994 also prohibited intentional lethal take during commercial fishing operations. Implementation of these changes required a substantial amount of additional work from the Agency. NMFS has made significant progress in fulfilling these and other mandates of the MMPA. A good example of this progress is the establishment of an early warning system for mariners on the East Coast that alerts ship traffic to the presence of northern right whales to help reduce ship strikes of this critically endangered species.

Marine Mammal Stock Assessments. Under section 117, NMFS has carried out the 1994 requirements to assess the status of marine mammal stocks and increase stakeholder involvement in the decision-making process through the development of a series of scientific review groups. These groups reviewed agency research and management needs relative to marine mammals, and NMFS, in consultation with these groups and the public, prepared and revised stock assessment guidelines. Within two years of enactment, these efforts by NMFS led to the completion of over 140 marine mammal assessment reports for marine mammal stocks in U.S. waters. These assessments revealed that for many marine mammal stocks, information critical to managers, such as abundance and distribution patterns, is virtually non-existent. To address data shortfalls using currently available resources, NMFS assessment efforts now focus intensively on species of special concern and on the lesser known stocks. Less effort is spent on stocks for which few conservation and management problems are anticipated to arise.

Classification of Fisheries. The MMPA Amendments of 1994 also established section 118, which provides new procedures to address marine mammal interactions with commercial fisheries. The new section requires that NMFS publish, at least annually, a List of Fisheries that places each U.S. commercial fishery into one of three categories based on the level of incidental serious injury and mortality of marine mammals in that fishery. However, ambiguities within the MMPA have constrained NMFS to classify fisheries based on the levels of interactions with marine mammals that result in confirmed mortalities. To address this situation, NMFS recently developed draft guidelines for determining what constitutes a "serious injury," so that these interactions can also be taken into account. Further, this fishery classification system consists of a two-tiered, stock-specific approach that first addresses the total impact of all fisheries on each marine mammal stock, and then addresses the impact of individual fisheries on each stock. Through this approach, NMFS can focus on species of particular concern relative to fisheries interactions, and then examine the various sources of injury or mortality.

Registration and Reporting of Fisheries. Section 118 also requires fishermen to submit reports of marine mammal injury and mortality providing additional information about marine mammal interactions with fisheries. Under this provision, all fishermen must report to NMFS any marine mammal mortalities or injuries that occur incidental to commercial fishing operations within 48 hours of the vessel's return to port.

Fisheries with frequent or occasional interactions with marine mammals are classified as Category I or II fisheries, respectively. Fishermen participating in those fisheries must register under the Marine Mammal Authorization Program to engage in lawful incidental take of marine mammals.

As a result of this and other programs established by the 1994 amendments, NMFS has collected detailed information on fisheries for which few data previously existed concerning protected species interactions. This new information includes up-to-date information on the geographic range of the fisheries, the seasons during which the fisheries operate, what type of gear is used, how the gear is fished, the number of participants in each fishery, what species of fish are targeted in each fishery, and what type of management program exists for each fishery. These data allow NMFS to more effectively manage fisheries while minimizing the impacts to the overall industry, and to work with fishermen to identify and develop gear technologies that will reduce their interactions with marine mammals. For instance, NMFS worked closely with fishermen in the Gulf of Maine to develop acoustic deterrence devices, "pingers," that can be used by fishermen to decrease marine mammal interactions with certain types of gear. Unfortunately, compliance with the registration requirement is inconsistent, making available data for some fisheries less than complete.

Take Reduction Plans. The MMPA Amendments of 1994 also require NMFS to convene take reduction teams to develop plans for reducing bycatch of marine mammals in selected fisheries. Plans are designed to assist in the recovery or prevention of depletion of strategic marine mammal stocks. Take reduction plans have been completed and implemented by final regulations for Pacific offshore cetaceans, Atlantic large whales, and harbor porpoise in the Mid-Atlantic and the Gulf of Maine. These plans are complex, and sometimes controversial, since they attempt to meet both marine mammal conservation requirements and the needs and concerns of the fishing industry. However, through the dedication of participants from a wide-range of stakeholder groups, we are seeing some real successes in the preliminary stages of implementation. Specifically, measures within the Pacific Offshore Cetacean Take Reduction Plan have reduced marine mammal interactions by an order of magnitude in only two years of implementation. Using this plan, commercial fishermen have reduced their interactions with whales and dolphins from approximately 500 per year in the early 1990s to about 50 in 1998. NMFS believes that the take reduction team approach makes best use of resources and stakeholders' input to reduce marine mammal bycatch and maintain sustainable fisheries for the long

term. This is an excellent example of NMFS' attempts to meet the mandates under the MMPA as well as the Magnuson-Stevens Fishery Conservation and Management Act.

Increasing Seal and Sea Lion Populations. The importance of marine mammals as significant functioning elements of marine ecosystems has been an underlying tenet of the MMPA since its enactment. The section 120 amendments in 1994 identified specific objectives to assess the role of seals and sea lions in their ecosystems. This included assessment of interactions between increasing stocks of seals and sea lions and anadromous fish stocks on both coasts of the United States. Pursuant to this mandate, NMFS published a report to Congress in June 1997 which found that on the East Coast more information is needed on seal and sea lion interactions with salmonids and the aquaculture industry. The report also concluded that deterrence technologies should be enhanced before any significant management actions should be taken. After providing an opportunity for and considering significant public comments, NMFS compiled a second report and submitted it to Congress in February 1999. This report found that although seal and sea lion predation did not cause the decline of endangered salmonid species on the West Coast, it may be affecting the recovery of already depressed populations. This document recommends implementing expanded lethal removal authority of the MMPA for certain situations. The report also recommends the development of safe, effective non-lethal deterrence measures, site-specific management of these interactions, and identifies information needs for conducting further research.

Cooperative Agreements in Alaska. The 1994 amendments provided for cooperative agreements between NMFS and Alaska Native organizations to conserve marine mammals and to co-manage subsistence use by Alaska Natives. On April 29, 1999, NMFS and the Alaska Native Harbor Seal Commission signed an agreement to work together in developing a co-management plan for harbor seals. NMFS is also working with the Cook Inlet Marine Mammal Council to reach an agreement on an appropriate level of beluga whale harvest in Cook Inlet, Alaska, as well as working with the Alaska Beluga Whale Committee to develop a co-management plan for beluga whales outside of Cook Inlet.

Permitting and Captive Display. The MMPA Amendments of 1994 also made significant changes to the permitting provisions of sections 102 and 104 of the MMPA which govern permits for public display, scientific research, and enhancement of marine mammal species and stocks. These amendments: 1) simplified the procedures for authorizing transfers of marine mammals among public display

facilities and substantially reduced oversight for the care and maintenance of captive marine mammals; 2) established a streamlined General Authorization procedure for scientific research activities that have the potential to disturb, but not to injure, marine mammals not listed under the ESA; 3) created a new permit category for photography of non-listed marine mammals for commercial and educational purposes; and 4) established a prohibition on exports of marine mammals and marine mammal parts, except for purposes of public display, scientific research, or enhancement.

On May 10, 1996, NMFS published a final rule amending the regulations for permits to reflect many of the 1994 changes. The rule updated and consolidated the regulations for special exception permits and established basic permit requirements applicable to all permits to take, import, and export marine mammals and marine mammal parts for purposes of scientific research and enhancement, photography, and public display. It also provided permit criteria specific to scientific research and enhancement. A Memorandum of Agreement among NMFS, FWS, and the USDA's Animal and Plant Health Inspection Service to clarify roles of oversight for the public display industry was completed last summer. NMFS will soon publish regulations specific to marine mammals in public display.

Other Reauthorization Issues

While the 1994 amendments have been effective in clarifying and strengthening regulatory processes under the MMPA, there are a few outstanding issues that the Committee may wish to consider in the reauthorization process.

Zero Mortality and Serious Injury Rate Goal (ZMRG). One of the most difficult challenges remaining is how to reduce levels of marine mammal mortality and serious injury to approach the zero mortality and serious injury rate goal (ZMRG) required by the MMPA Amendments of 1994. The key to success is to evaluate and clarify the concept of ZMRG and its implications for marine fisheries. NMFS is in the process of preparing a report to Congress on progress toward reducing marine mammal mortalities and serious injuries.

Fisheries Monitoring Programs. One challenge created by the MMPA Amendments of 1994 is the requirement for NMFS to establish a program to monitor incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. The purposes of fishery monitoring programs are to obtain statistically reliable estimates of incidental mortality and serious injury of marine mammals in commercial fisheries; to

determine the reliability of reports submitted by fishermen; and to identify possible changes in fishing methods or technology that may decrease incidental mortality and serious injury. Monitoring programs are generally in the form of at-sea observer programs, which collect marine mammal and environmental data as well as information on fishing technique characteristics to help determine factors that may contribute to these interactions.

Funds for monitoring programs have been limited; therefore, only fisheries experiencing frequent interactions with marine mammals have generally received priority for observer program coverage. In 1997, approximately 1/5 of the U.S. fisheries having frequent or occasional interactions with marine mammals were observed for these interactions. These large gaps in our knowledge of fisheries' impacts to marine mammal stocks makes it difficult to develop appropriate management measures. If we are to more accurately assess which fisheries are impacting marine mammals and under what conditions, NMFS will need to have more comprehensive and equitable observer coverage of fisheries. This need is reflected in the \$590,000 increase for enforcement and observer activities in NOAA's FY 2000 budget request to Congress.

Definition of Harassment. NMFS has experienced difficulties with respect to implementation and interpretation of the current definition of harassment. The two-tiered definition is complex and is somewhat ambiguous. For example, scientists and photographers must obtain permits for Level B harassment, but activities which may more clearly impact a marine mammal are not necessarily controlled.

Release and Export. Public display issues have also arisen concerning the intent of Congress with regard to the release of marine mammals to the wild and the export of marine mammals to foreign facilities. The export provisions of section 104(c)(9) do not provide sufficient monitoring and enforcement authority. There is also ambiguity in the Act with regard to the release of captive marine mammals to the wild. The scientific research permit process allows for considering measures to protect the animal being released, as well as wild stocks.

Newly Developed Deterrence Measures. Another issue facing NMFS is the use of newly developed marine mammal deterrence measures. Currently, manufacturers and users of acoustic technologies to deter marine mammals can use them prior to any determinations of their impacts to marine mammals. NMFS carries the burden of proving whether or not such devices are unsafe, even if the

deterrence measures are already in place. It would be more prudent for the safety of these devices to be determined before they are used in the marine environment.

Other Issues

Other provisions that merit review within the MMPA are the need for a streamlined general authorization process for incidental Level B harassment of marine mammals - similar to that used for scientific research permitting; the clarification of vessel registration and monitoring requirements; the clarification of the definition of "harassment"; and the need for penalties for violations to be more consistent with other marine resource statutes.

Conclusion

The MMPA Amendments of 1994 made significant strides forward in marine mammal conservation. Since then, NMFS has been working to implement these changes made to the MMPA. Over the years, the benefits of the MMPA on marine mammal stocks in the United States have been significant, and its indirect impacts on the status and conservation of marine mammal species around the world are surely immeasurable. Since its passage, other countries have not only looked toward the United States for guidance on marine mammal conservation issues, but have established policies of their own modeled after the MMPA. As we turn toward the new millennium, emerging issues and new threats to marine mammals will certainly arise, and the MMPA will need to evolve to effectively protect marine mammal populations, while balancing human needs as well.

I welcome the opportunity to discuss these issues in detail with you and stakeholders to work toward effective resolution to these and other important marine mammal conservation issues.